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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 628

INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY,

Appellants,

vs.

COLUMBUS AND GREENVILLE RAILWAY COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION.

PETITION FOR REHEARING

R. C. STOVALL,
General Counsel, Columbus and Greenville Railway Company.

FORREST B. JACKSON,
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The Columbus and Greenville Railway Company, appellee in the above-styled cause, respectfully petitions the Court for a rehearing and reconsideration of its decision entered therein on the 7th day of June, 1943, and for cause represents unto the Court the following:

Appellee, with deference, submits that any holding of the Commission that appellee carrier, "'in separately establishing' its rates for a portion of a through haul, must not purport to alter the rates established by connecting lines," which this Court seems to adopt as a "permissible construction of section 6(1)" and basis for its decision, is not supported by the

undisputed facts in this case and is in conflict with the correct statement of the purpose and effect of appellee carrier's tariff expressed in paragraph four of the opinion of this Court, to-wit: "It sought by its I. C. C. Tariff No. 81 to establish schedules of payments to shippers which would give them the benefit of the cut-backs on cottonseed and its products shipped outbound over its line, whether the inbound haul was over its own line or over a connecting line." Appellee points out that, if the inbound shipments over the lines of appellant carriers had come to "rest" and were "free" in the sense that the originating carrier had no legal right to recapture them, then it is inapt to say that I. C. C. Tariff No. 81 was for the purpose of getting a "portion of a through haul" by trying to "alter the rates established by connecting lines."

If the statement from the report of Division 3 of the Commission referred to in paragraph 8 of the Court's opinion, "Protestants point out that the cut-back rates are extremely low . . . and that these low cut-back rates can be justified only in consideration of the inbound carriers obtaining the outbound movement," is to be construed as expressing a finding of the Commission, it is directly in conflict with the Commission's finding that "outbound cottonseed products traffic is free traffic and no particular carrier has any inherent right to it", R. 62—for the sake of sustaining a rate or otherwise. Neither is it in conformity with the statement of the Commission, also adopted by this Court, that "the cut-back rates and tariffs of the trunk lines are not here in issue, and nothing in this report is to be construed as either approving or condemning them." To say that cut-back rates can be justified only in consideration of the inbound carrier's obtaining the outbound movement is to openly assert that their reasonableness is dependent upon an acceptation of the principle that the outbound traffic is tied to the inbound carrier's rails, or in the interest of rate maintenance the outbound carrier is

entitled to successfully exclude competition by denying that the inbound traffic becomes free traffic at the mill point. It is to say that the cut-back rate is compensatory and therefore reasonable only when there is a universally followed "rule of practice" which gives to a carrier the right to recapture traffic which it originates. The *Atchison case,* 279 U. S. 768, holds that "there is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

Under the facts in the case at bar, when the seed move to the mill point, they become free traffic as that term is used in the *Atchison case,* that is to say, "It is traffic which has previously moved in on local or joint rates to the milling point and has there come to rest." The record will reflect, Stenographer's Minutes I. & S. Docket No. 4599, page 91, that, when the first proceeding was had under the amended Tariff I. C. C. 83, this appellee informed the Examiner that it based its right to compete for the traffic under the express holding of this Court in that case. And, with deference, the appellee submits that it is entitled to a clear expression from this Court of the difference in principle, if any, between the *Atchison case* and the instant case with reference to the movement of grain to a reshipping point and the cottonseed to a milling point where both moved under separate bills of lading.

In paragraph eight of its opinion, the Court further refers to the finding of Division 3, which was reiterated by the full Commission that "Instead of placing itself on an equal basis with its competitors, respondent's present effective and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier." What influence this had upon the decision of the Commission or of this Court, we are not told. The inference seems to be that the action of appellee in filing its tariff created an advan-

tage over its competitors or produced an unfair result, in that a rate structure has been disturbed. We submit that the finding is without legal significance and is properly characterized by this Court in its opinion in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 507:

> "Every change of a rate schedule, either voluntary or involuntary, is a disruption pro tanto of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change."

There is not a fact stated in the report of the Commission or the decision of this Court to indicate that it will be unjust or impracticable for appellee's competitors to so amend their tariffs as to apply the cut-back allowance to seed moving into the mill point over appellee's line. We invite the Court's attention to page 29, Stenographer's Minutes, I. & S. Docket No. 4599, where appellee witness Hawkins, upon cross-examination by counsel for appellant Frisco, testified as follows:

> "Q. Well, now, suppose the other railroads would start to doing the same thing as you have done under this proposed tariff, what do you think would be the effect of it?
>
> "A. I think it would have the effect of killing the cut-back. *I might say there too, Mr. Roberts, we certainly would not object to any carrier doing what we have done.* (Italics ours.)
>
> "Mr. Roberts: I understand that."

Further, in answer to the more favorable position argument, we invite the Court's attention to statements of appellee witness Hawkins from the Stenographer's Minutes, I. C. C. Docket No. 28590, pages 15 and 16, filed with this Court, as are the Stenographer's Minutes in I. & S. Docket No. 4599, although not a part of the printed record:

> "Q. Will you make a commitment in the record that the respondent will make no objection to the intervener

or any of its connecting carriers filing a similar tariff to the one now in issue, I. C. C. No. 81?

"A. Yes, sir, I would be glad to make the commitment. We have never objected to any of our connections or any line publishing a tariff similar to that we are proposing or similar to that now in effect.

"Q. Has the respondent endeavored from time to time to have its connections eliminate the cut-back provision from the tariffs on cottonseed?

"A. Yes, sir. We thought the system of rates was a mistake and that it had outlived the purpose for which originally made.

"Q. Will you make the further commitment that the Columbus & Greenville Railway Company, as a condition of approval by the Commission, of its I. C. C. Tariff No. 81, agrees to eliminate from its tariff the cut-back provision on seed originating on its line and moving into the mill point so as to make the cut-back rate the normal level of rates?

"A. We agree to amend the tariff so as to establish the cut-back rates as the normal level of rates on seed originating at points on this line and thereby void any tie-up between the inbound seed movement and the outbound products therefrom.

"This will then place respondent and its connections on an absolute parity in the movement of cottonseed products from common points.

"I might say by way of further answer to that question that this carrier's tariff seeks no advantage whatever over its connections. We think that the cottonseed when it moves to the mill point in the first instance should not be tied up to require the movement of the product therefrom out over the line that brought the seed in, because there is no connection between the cottonseed inbound and the manufactured product outbound."

We submit, under the *Atchison case*, the traffic is free traffic, and the record is conclusive that the appellee is willing to do all in its power to guarantee that it will remain free

traffic, and certainly under these circumstances the more favorable position holding of the Commission and the claimed disturbance of a rate structure collapses.

We submit there is no legal justification to take from this carrier appellee the right to initiate a tariff that produces a result that the Commission nowhere has said was unreasonable and which only places appellee on a parity to compete with appellant carriers for traffic.

The Commission, page 9 of the Record, found:

> "The originating lines hold themselves out to cut back their local inbound rates on the seed which they originate in order to induce the shipper to move the outbound products over their lines. If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's tariff as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading."

And by this finding the Commission clearly states the reason for appellee's tariff and offers convincing support for appellee's position that the tariff should not be canceled.

Apparently, with some influence upon this Court, appellant carriers devoted nineteen pages of their thirty-eight-page Brief on Reargument (pages 19-38) to a discussion of section 15, paragraphs 3 and 4 of the Act, which deals with the power of the Commission to establish through routes and joint rates and a limitation upon that power. That was the first appearance of such an argument anywhere in this case. It is based on the assumption that the appellants have an inherent right to the continuous movement of the seed to the mill point and the products from the mill point to destination, whether they originated the seed or not and regardless of the fact that the seed moved to the mill point under a separate bill of lading and all obligations between the shipper, the carrier and the consignee were ended. The right of appellants under certain circumstances to their long haul when the

Commission is exercising its authority in a procedure under section 15 to fix joint rates without the concurrence of the participating carriers, is not involved in the remotest fashion in this lawsuit, and as to the basis of such a claim this Court in paragraph 8, says: "With what foundation we do not decide." But the Court does refer to the statement of the Illinois Central that, in recent years, it has already abandoned branch lines in Mississippi having a greater mileage than the whole of appellee's line and further points to appellants' claim that to deny them protection (of the long haul) may force the abandonment of branch lines, which Congress sought by amendment to section 15, paragraph 4, to avoid. These matters were irrelevant, were not before the Commission, and properly should have no bearing upon the decision of this case. The appellee, which now operates 168 miles, has heretofore abandoned 57.64 miles (See Abandonment of Branch Lines of C. & G. R. R. Co., 71 I. C. C. 725) and the Delta Southern Railroad operated by it, which consisted of 54.56 miles. This, however, does not, and should not, any more than the I. C. abandonments, have any bearing upon the issues in this case.

In other words, we submit that this Court has mistakenly given weight to an irrelevant matter, namely, that, unless appellants' right to recapture inbound shipments by giving a cut-back on the outbound movement was protected, they would need to abandon certain lines. We submit it does not appear that the Columbus and Greenville rate structure was in any measure the cause of such abandonment, which was based wholly upon other grounds. The necessity of abandoning lines in the future is mere speculation and that question can best be dealt with when it arises from actual experience with this carrier's rate structure and not as a speculative theory moulded to suit its competitors' present need.

Appellee further represents that, throughout the controlling opinion, is the insistence that I. C. C. Tariff No. 81 was

a "disregard of the statutory requirements for the establishment of joint tariffs," and that the concurrence of participating carriers was necessary. Appellee, with deference, represents that, in fact, it is not a joint tariff and there were no participating carriers. It does not name any rates to or from any points. It is merely a schedule of allowances computed in a manner exactly as are the allowances in the cutback tariffs of rail appellants. In its operation, it equalizes the net rate through claim channels that the shipper pays, making the cost the same to the shipper regardless of which carrier's line is used in transporting the product. This allowance or reduction is the sole responsibility of appellee.

We submit that, in paragraph 7 of its opinion, the Court has mistakenly given legal significance to the Commission's view as to the unlawful effect of the schedule (I. C. C. Tariff No. 81) upon the outbound joint rates, namely, "that the tariff operated to reduce such outbound rates without the concurrence of participating carriers," holding that this view was a "tenable one" and further that, under its adoption, "violation of section 6(4) is clear."

We are not told how an allowance by the appellee, to which no other carrier contributes and which does not reduce any other carrier's part or division of the revenue from the joint outbound rate, would require the concurrence of those carriers parties to the outbound joint rate. Section 6(4) simply provides:

> "(4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission." . . .

We adopt the language used by appellant carriers in describing the purpose of this paragraph of section 6 at page 7 of their Brief on Reargument, as follows: "This paragraph provided the means by which joint tariffs might be authenti-

cated and the public apprised of the railroads participating therein." See *Dayton Co.* v. *C. N. O. & T. P. Ry. Co.*, 239 U. S. 446. The Commission has superimposed upon section 6(4) a construction that its plain wording will not admit of. It is in direct conflict with the decision of this Court in *Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247.

The omnibus clause, which appellant carriers admit is a part of the joint rate tariffs under which the outbound products move, and shown as Appendix B to appellant carriers' Brief on Reargument and Exhibits B and C to appellee's Brief on Reargument, clearly authorizes "privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment between points named" therein, to be covered by separate tariffs, even though the joint or through rate is affected, provided same is done "entirely upon the responsibility and at the cost of the carrier granting the privilege." This omnibus clause is the confirmation of a practice of many years and a recognition that carriers, parties to a joint rate, may, by their separately established tariffs, "operate to reduce such jointly established rates without the concurrence of the participating carriers," so long as it is their sole responsibility, as is the situation in the case at bar.

We respectfully invite the Court's attention to pages 47 to 49 of the Transcript, I. & S. Docket No. 4599, which remove any doubts that the tariff in the case at bar is not unlike many other tariffs separately established by carriers parties to a joint rate without requiring the concurrence of the participating carriers even though the joint rate might be affected. We are not asking the Court to view the evidence for the purpose of resolving opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit, but, as said by this Court in *Florida* v. *United States*, 282 U. S. 194, we ask that the Court examine the evidence, not to make findings for the Commission but to "ascertain whether its findings are properly supported."

Not since Section 6(4) became a part of the Interstate Commerce Act on June 29, 1906, when it was amended by the Hepburn Act, has there been read into its plain and unequivocal language the construction given by the Commission and the controlling opinion in this case.

The Commission, in its opinion, found that "if it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's tariff." R. 9. In other words, appellee, in exercising its managerial prerogative to initiate rates, filed the tariff in the case at bar to meet competition. The resulting rate produced, being exactly the same under similar circumstances as that produced by the cut-back tariffs of appellant carriers, was not and could not be characterized as unreasonable.

The tariff is similar in operation and effect to the allowance tariffs of carriers generally for pick-up and delivery service, which are discussed in the transcript of evidence heretofore referred to. Those tariffs operate on a joint rate, and none of the carriers to the joint rate are required to concur in the tariffs that provide for the pick-up and delivery service. Those tariffs were devised to meet truck competition and at a time when motor carriers were not under the regulation of the Interstate Comerce Commission. There was not then, and is not now, any "plus charge" to the joint rate for the service. The Commission gives its approval to such tariffs in this language: "With no 'plus charge' (the tariff) is equivalent to a proposal to reduce rates, there being no difference in principle between a rate reduction and an enlargement of service at existing rates." 218 I. C. C. 441, 475.

Appellee, with deference, further represents that there is no necessity for the concurrence of other carriers in its tariff No. 81, which does not purport to be a joint tariff and which does not in any wise operate to establish a joint rate over a through route composed of the lines of two or more carriers

over which no through route and joint rate have been fixed by agreement by absorbing the local rate of the connecting carrier, and therefore a lack of concurrence, we submit, would not constitute a violation of section 6(4). The through routes with joint rates to which all carriers to this litigation are parties are lawfully in effect. There are also in effect and not questioned the separately established local tariffs of the carriers here involved. The cut-back tariff of appellee, I. C. C. 81, does not name any rate for the waybilling of traffic but is a tariff prescribing a rule or practice which is the sole responsibility of appellee and is fully characterized by the language in the dissenting opinion by Commissioner Splawn:

> "This tariff provision in no wise affects the amount of the rates paid for the inbound service to the mill point. Its only effect is to reduce the outbound rate and thus make applicable the same rate as applies when the outbound haul is performed entirely by the trunk lines." Record, page 11.

In the last sentence of the controlling opinion, the Court seems to suggest that the method of procedure adopted by appellee was not the appropriate procedure outlined in the *Santa Fe case*, 279 U. S. 768. We submit the Court has given emphasis to the form rather than the substance. The *Santa Fe case* was a proceding by injunction "to enjoin and annul an order of the Interstate Commerce Commission. That order directed the Atchison, Topeka & Santa Fe and two other railroads to cancel proposed tariffs." The Southern was disabled by certain tariffs from competing for certain shipments of grain in storage and waiting to be moved. It "undertook to help itself." It filed a tariff with a proportional rate on the outbound shipments, and the Commission refused to suspend it. Then the Santa Fe with a new tariff imposed a four-cent addition on its inbound shipments that moved out over the Southern, which the Commission ordered canceled, and then the injunction. Looking through the form to the substance,

it is apparent that both the Commission and the Court sustained the Southern's right to treat the stored grain as "free grain", and its right to "compete for the traffic." That is what the C. & G. has done; it resorted to a self-help proportional rate on outbound "free" cottonseed and cottonseed products, and the Commission ordering its cancellation, the injunction by a three-judge court was the appropriate statutory remedy; there was no other way of testing the validity of the Commission's order to cancel the cut-back tariff.

We submit that the questions raised by the Court in the concurring opinion by Mr. Justice Douglas, if answered, would confirm the right of appellee to the injunction granted by the lower court.

We further submit that there is no dispute in the facts and that an examination of the record, and especially the transcript of the evidence filed with this Court but not made a part of the printed record, reveals that the Commission could not separate the C. & G. cut-back rule from the "free" traffic rule laid down in *A. T. & S. F.* v. *United States*, 279 U. S. 768; nor from the rule announced in *Central R. Co. of N. J.* v. *United States*, 257 U. S. 247, that a carrier might, by its individual tariff, provide an allowance, even though there was a joint through route with joint rates; nor from the rule giving a carrier the right to "initiate rates" set out in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. Since neither a majority of the Commission nor a majority of the Court has distinguished the C. & G. rule from the rules announced in those cases, and the whole Court agree that the Commission's reports were vague, obscure and indicate that the appellee might still obtain relief by some other undefined proceeding before the Commission, we submit that equity requires that the appellee's right to promulgate a tariff to enable it to compete for "free" freight, which its competitors have no legal right to recapture, should not be summarily

terminated on a record which the whole Court considers to be unsatisfactory on account of the deficiencies in the findings of the Commission.

This Court, in the *Milwaukee case,* supra, speaking of such a report of the Commission, said:

> "In the end we are left to spell out, to argue, to choose between 'conflicting inferences.' Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong." 294 U. S. 510, 511.

Appellee represents that, if a decision reversing the judgment of the lower court stands, it is subject to "damage which is substantial, immediate and irreparable", and, even if in a further proceeding upon complaint before the Commission, the Commission should grant this carrier relief in other form, it would be powerless to restore the damage to appellee pending the termination of the subsequent proceeding.

WHEREFORE, PREMISES CONSIDERED, appellee prays the Court to grant it a rehearing, and if mistaken in this, that the Court's opinion be construed so that this appellee might with certainty know what further procedure is available so as to compete on an equality of rates between common points with appellant carriers.

Respectfully submitted,

R. C. STOVALL, *General Counsel for Columbus and Greenville Railway Company,*
Appellee.

FORREST B. JACKSON,
Of Counsel.

CERTIFICATE

I, R. C. Stovall, Counsel for Appellee, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

R. C. STOVALL,
Counsel for Appellee.

Dated at Columbus, Mississippi,
July 10, 1943.

End